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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-197

In the Matter of the Arbitration between

INTSEL CORPORATION,

Petitioner-Respondent,

and

M. W. ZACK METAL COMPANY,

Respondent-Petitioner.

PETITIONER-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF SUMMARY REVERSAL OR OF CERTIORARI

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PETITIONER-RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF SUMMARY REVERSAL OR OF CERTIORARI

This brief is submitted on behalf of Petitioner-Respondent, Intsel Corporation ("Intsel"), in opposition to the petition of Respondent-Petitioner, M. W. Zack Metal Company ("Zack"), for a writ of summary reversal or of certiorari to review a unanimous judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on March 13, 1975.

FILED THROUGH

Opinion Below

The opinion of the District Court, Southern District of New York (Gurfein, J.), annexed to the petition herein as Appendix A, was not officially reported.

The order of the Second Circuit Court of Appeals (Lumbard, Moore and Feinberg, JJ.), unanimously affirming without opinion the judgment of the District Court, is annexed to the petition as Appendix B. The orders of the Court of Appeals denying a rehearing and a rehearing *en banc* are annexed to the petition as Appendix C.

Statutes and Rules Involved

9 U.S.C. §§9, 10, 11

"§9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdic-

tion of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

§10. Same; vacation; grounds; rehearing

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not

expired the court may, in its discretion, direct a rehearing by the arbitrators.

§11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties."

Comercial Arbitration Rules of the American Arbitration Association §§22, 30 and 42

"*Section 22.* STENOGRAPHIC RECORD—The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 49.

Section 30. EVIDENCE—The parties may offer such evidence as they desire and shall produce such additional evi-

dence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties, except where any of the parties is absent in default or has waived his right to be present.

Section 42. SCOPE OF AWARD—The Arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The Arbitrator, in his award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due the AAA, in favor of the AAA."

Questions Presented

1. Did the District Court err in confirming an arbitration award where no showing was made of the existence of any of the grounds for vacating or modifying an award listed in 9 U.S.C. §§10 and 11?

2. Where contracts of sale provide for arbitration of any controversy arising under or relating to the contracts or any modification thereof, and the parties thereto proceed to arbitration before an arbitrator duly selected pursuant to

the Rules of the American Arbitration Association, and the arbitrator's award could rationally have been based on the contracts presented to him, did the arbitrator exceed his powers within the meaning of 9 U.S.C. §10(d) in that he apparently resolved issues of fact in favor of the successful party?

3. Did the District Court err in confirming an arbitration award where the arbitrator conducted a hearing pursuant to the rules of the American Arbitration Association, at which both parties were accorded the opportunity to present evidence and argument, and rendered an award precisely based upon the quantity of goods actually shipped pursuant to the contracts, and where his conduct of the hearing was wholly consistent with the standard of informality and expedition appropriate to arbitration proceedings?

Statement of the Case

Zack petitions herein for review of the unanimous judgment of the United States Court of Appeals affirming the decision and order of the United States District Court for the Southern District of New York (Murray I. Gurfein, J.). That decision granted the application of Intsel for confirmation of an arbitration award and denied Zack's motion to vacate said award.

Intsel commenced this proceeding in the United States District Court for the Southern District of New York pursuant to 9 U.S.C. §9 by the filing and service of its Notice of Application and Petition to confirm an arbitration award duly rendered pursuant to the Rules of the American Arbitration Association (hereinafter referred to as "the

AAA") (A. 1-9).* Federal jurisdiction was based upon the provisions of the arbitration agreement between the parties and their diversity of citizenship. Zack opposed the application and moved to dismiss the petition, claiming lack of jurisdiction, improper venue, insufficiency of process and failure to state a claim upon which relief could be granted; it also moved to vacate the award on the purported grounds that the award was procured by corruption, fraud, or undue means, that the arbitrator was guilty of misconduct and that the arbitrator had exceeded his powers (A. 10-11).

The District Court (Gurfein, J.) rendered its opinion and order confirming the arbitration award and denying Zack's motion in all respects, and judgment has been entered upon said order. Zack's motion for reargument was granted by Judge Gurfein and, upon reconsideration, the Court adhered to its original decision (A. ii).

The Court of Appeals for the Second Circuit (Lumbard, Moore and Feinberg, JJ.) unanimously affirmed, without opinion, the decision of the District Court. Zack's petitions for a rehearing and a rehearing *en banc* were denied.

On this appeal, Zack seeks a writ of summary reversal or of certiorari to review the decision and judgment below. It apparently bases its argument on alleged due process grounds, claiming that it was entitled to a retrial in the courts below of the facts considered by the arbitrator.

The objections to jurisdiction and venue, which Zack asserted in the District Court, and which were rejected,

* Pages in the Appendix before the Court of Appeals are hereinafter referred to as "A.—."

have not been pressed here or before the Court of Appeals. Neither has Zack here pressed its other rejected claims of insufficiency of process and failure to state a claim upon which relief could be granted or its allegations that the award was procured by corruption, fraud, or undue means, or that the arbitrator was guilty of misconduct.

Statement of Facts

During 1969, Intsel, a New York corporation with its principal place of business in New York City, and Zack, a Michigan corporation with its principal place of business in Michigan, entered into two agreements, Intsel's contract numbers 50240 (A.7-7a) and 50617 (A8-8a), for the sale of certain aluminum tubing and rods by Intsel to Zack. Each agreement, and each subsequent amendment thereof, was confirmed by Intsel's written contract which contained the following identical clause:

> "Any controversy arising under or in relation to the contract or any modification thereof shall be settled by arbitration in the City of New York in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association, and judgment on this award may be entered in any court, State or Federal, having jurisdiction." (A.7a, 8a)

Contract 50240 was originally made pursuant to Zack's purchase order 3908 dated January 7, 1969 (A.76-76a) and Intsel's sales contract 50240 dated January 13, 1969 (A.7-7a) and provided for the sale of 40,000 pounds of aluminum hollow bar (tubing) at $.503 per pound. It was subsequently amended, however, pursuant to Zack's written re-

quest dated June 18, 1969 (A.50) and Intsel's "Change Order IV" dated June 23, 1969 (A.51) to cover 55,000 pounds, of somewhat different specifications (A.64-66).

Contract 50617 was originally made pursuant to Zack's purchase order 3917 dated July 29, 1969 (A.52), as amended as to price by Zack's letter dated August 5, 1969 (A.77), and Intsel's contract 50617 dated August 7, 1969 (A.8-8a). It provided for the sale of 10,000 pounds of aluminum round rods at $.462 (changed to $.464) per pound. It was subsequently amended pursuant to Intsel's "Change Order I" dated September 9, 1969 (A.78) which modified the specifications but left all other terms and conditions unchanged (A.66-67).

Delivery was made of 60,553 pounds under contract 50240 and 10,335 pounds under contract 50617 (A.68-69). Zack accepted and retained the goods (A.68), but made no payment therefor.

A controversy having arisen under the contracts, as amended, Intsel duly served Zack with a written Demand for Arbitration dated April 12, 1973 (A.70), setting forth the nature and amount of the claim and containing the following notice:

> "PLEASE TAKE FURTHER NOTICE, that unless within ten days after service of this Notice of Intention to Arbitrate, you apply to stay the arbitration herein, you shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time."

Zack did not apply to stay the arbitration, but promptly appeared in the arbitration proceeding by its counsel (A.59, 71). A proposed list of arbitrators was sent to both counsel by the AAA (A.72-72a), but Zack failed to designate its choices for arbitrator, even though given additional time to do so by the AAA (A.59-60, 74). Consequently, after due notice to both parties, the AAA selected an arbitrator from the list returned by Intsel (A.60, 75). The arbitrator thus chosen, Mark A. Buckstein, Esq. was Intsel's fifth choice out of six proposed arbitrators (A.59, 73).

Zack's New York counsel appeared before the arbitrator prior to the hearing date, but raised no objection to Mr. Buckstein's service (A.60). Thereafter, a hearing was held, at which both Zack and Intsel were represented by counsel and presented witnesses and documentary evidence (A.61, 63). No stenographic record was made of the hearing nor did Zack request that one be made pursuant to the rules of the AAA (A.61).

At the hearing, Zack argued, among other things, that one or both contracts had been "superseded" by their written amendments, that the contracts had been orally "cancelled" at the time of delivery and that Zack had accepted delivery "on Intsel's account." (A.46) Zack's factual assertions were vigorously disputed by Intsel and were contradicted by documentary evidence (A.68) (Zack's repeated assertions that its version of the facts was "conceded," "admitted," "not denied" or "not in dispute" before the arbitrator are incorrect).

Although not required by the Rules of the AAA to follow any particular procedure, the arbitrator permitted

both parties to present all their witnesses and to cross-examine those of the other side, permitted opening addresses and closing summations by counsel and occasionally questioned the witnesses himself for clarification (A.63). Thereafter, he made his award in writing (A.9), directing Zack to pay to Intsel $35,253.60, together with interest thereon at the rate of 6% from January 1, 1970 to the date of payment and, in addition, $702.53 for fees previously advanced by Intsel to the AAA. The award also denied all counterclaims of Zack (A.4-5, 9).

Summary of Argument

In a proceeding under the Federal Arbitration Act to confirm an arbitration award, the court must confirm the award unless the opposing party establishes the existence of one of the specific grounds for vacation or modification of the award prescribed in Sections 10 or 11 of the Act. The court's power to review arbitration awards is extremely limited and an arbitrator can only be held to have exceeded his powers under Section 10(d) of the Arbitration Act if the record before the District Court shows that the award manifestly disregarded the law or was completely irrational in terms of the submission to the arbitrator.

In the case at bar, the parties voluntarily agreed to submit to arbitration any controversy arising from the contract or any modification thereof. The arbitrators awarded damages to Intsel for the precise quantity and price of goods actually delivered pursuant to the latest contract between the parties. The award could rationally have been derived from the submission and was correctly

confirmed. Due process of law does not require that the issues already tried before the arbitrator be tried again in the District Court.

Reasons for Denying the Writ

The considerations set forth in this Court's rule governing review on certiorari, although not limiting the discretion of the Court, do support a denial of certiorari in this case (Rule 19.1(b)). We submit that none of the criteria set forth therein apply here. Indeed, not once in its overlong brief does Zack even refer to these guidelines. There is no conflict between the Second Circuit's decision in this case and any decision of any other court of appeals. There is no decision of an important state question which is in any way in conflict with applicable state law. There is no decision on an important question of federal law which has not been, but should be, settled by this Court. Nor has a federal question been decided in conflict with applicable decisions of this Court. We have here a decision of a court of appeals affirming a district court's confirmation of an arbitration award upon well established principles of law. As the District Court stated: "The petition for confirmation of an arbitration award has been unnecessarily transformed from the ordinarily perfunctory to the complicated by respondent's motion to dismiss the petition [to confirm] * * *" Although Zack has now limited his objection to the award to a claim under Section 10(d) of the Arbitration Act that the arbitrator "exceeded his powers," it has still made no showing sufficient to overturn it.

I

The arbitration award must be confirmed unless Zack has sustained its burden of showing that it is completely irrational.

A. An Arbitration Award May Not Be Attacked for Errors of Fact or Law.

Section 9 of the Arbitration Act, 9 U.S.C. §9, provides for application to the appropriate United States District Court for an order confirming an arbitration award where, as here, the agreement between the parties authorized the entry of judgment on the award and the application is made within one year after the award. It then provides that upon such application, "the court *must* grant such an order unless the award is vacated, modified, or corrected as prescribed in Sections 10 and 11 of this title" (Emphasis supplied).

As the Second Circuit Court of Appeals said in *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805 (2d Cir. 1960) at page 808:

> "[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated. See Note, Judicial Review of Arbitration Awards on the Merits, 63 Harv. L. Rev. 681 (1950). The statutory provisions, 9 U.S.C. §§10, 11, in expressly stating certain grounds for either vacating an award or modifying or correcting it, do not authorize its setting aside on the ground of erroneous finding of fact or of misinterpretation of law."

Thus, an arbitration award should be upset by the courts only with great hesitation. *Karppinen* v. *Karl Kiefer Machine Co.*, 187 F.2d 32, 34 (2d Cir. 1971). As the merits of the controversy submitted to arbitration cannot be reopened before the court, the role of the courts "is limited to ascertaining whether there exists one of the specific grounds for the vacation of an award, provided in §10 of the Arbitration Act * * *." *Saxis Steamship Co.* v. *Multifacs International Traders, Inc.*, 375 F.2d 577, 581 (2d Cir. 1967); *Catz American Co.* v. *Pearl Grange Fruit Exchange, Inc.*, 292 F.Supp. 549, 551 (S.D.N.Y. 1968).

As Judge Weinfeld said in *Oinoussian Steamship Corp. of Panama* v. *Sabre Shipping Corp.*, 224 F.Supp. 807 (S.D. N.Y. 1963) at page 809, cited by Judge Gurfein in his opinion below (A. 110, 111):

> "* * * there is as little justification for inquiry into the factual basis upon which the arbitrators reached their judgment as there is for inquiry into the basis upon which a jury determination rests. An award within the scope of the submission is conclusive on fact issues and interpretation of law."

The burden of proof on the issue of whether partiality or some other defect specified in §10 or §11 of the Act was present during the arbitration is upon the party making such an allegation. See *Saxis Steamship Co.* v. *Multifacs International Traders, Inc., supra*, at 582. With respect to each of the items listed in §10 an §11, Judge Gurfein found that Zack had failed to sustain this burden.

As Judge Gurfein correctly recognized (A.8), it is not the Court's function to review the factual and legal deter-

minations of the arbitrator. Section 42 of the Commercial Arbitration Rules of the AAA, to which the parties bound themselves, provides that the arbitrator "may grant any remedy or relief which *he deems just and equitable* and within the scope of the agreement of the parties * * *" (Emphasis supplied). He need not give the reasons for his decision. *Bernhardt* v. *Polygraph Co. of America,* 350 U.S. 198, 203 (1956); *Wilko* v. *Swan,* 346 U.S. 427, 436 (1953); *Sobel* v. *Hertz, Warner & Co.,* 469 F.2d 1211, 1215 (2d Cir. 1972). His award is thus insulated from attack by the courts for erroneous findings of fact or misinterpretations of law. *Amicizia Societa Navegazione* v. *Chilean Nitrate & Iodine Sales Corp., supra,* 247 F.2d at 808; *Oinoussian Steamship Corp. of Panama* v. *Sabre Shipping Corp., supra,* 224 F.Supp. at 807. It is irrelevant to consider whether a court of law would enforce the claims of either party. *Matter of Exercycle Corp. (Maratta),* 9 N.Y.2d 329, 337 (1961).

B. An Arbitrator Cannot Be Held to Have Exceeded His Powers Unless His Award Is Completely Irrational or Shows Manifest Disregard of the Law.

To the extent its position can be discerned from its somewhat obscure petition for certiorari, Zack seems to argue that the arbitrator did not properly apply the law of New York to the case, and thereby "exceeded his powers" (9 U.S.C. §10(d)) in that (1) he allegedly based his award on contracts which Zack claimed had been terminated and replaced by others, and (2) he apparently did not accept Zack's contention that the written agreements had been orally cancelled or modified. Additional arguments alleging bias, misconduct and other errors on the

part of the arbitrator and impropriety in his selection, made by Zack in the District Court and Court of Appeals and rejected therein, have been abandoned in the present petition. It now ascribes but one error to the courts below:

> "The single important error below was the court's refusal to do what is inherently necessary to ascertain when an award is claimed to be in excess of the powers of the arbitrator, viz; determine the truth of the facts on whether there was an excess of authority. This duty can only be performed by ascertaining the true facts that were set before the arbitrator." (Zack's petition at 27.)

The submission to the arbitrator in the case at bar was the broadest possible, providing for arbitration in accordance with the Rules of the American Arbitration Association of "[a]ny controversy arising under or in relation to the contract or any modification thereof." The words of this Court in *Wilko* v. *Swan, supra,* 346 U.S. at 436, are thus particularly appropriate.

> "In unrestricted submissions, * * * the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation."

In *Wilko,* an agreement to arbitrate was not enforced precisely because interpretations of the law by arbitrators are not subject to judicial review, and an investor's agreement to arbitrate would constitute a waiver of the access to the federal courts the Securities Act intended he should have. It was the very existence of the general rule insulating an arbitrator's decision from review that prompted this Court to exclude from the arbitral process cases arising under the Securities Act.

To show "manifest disregard" of the law by the arbitrator sufficient to challenge the award, the respondent must prove "something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law." *Saxis Steamship Co.* v. *Multifacs International Traders, Inc., supra,* 375 F.2d at 582. Any such exception must be severely limited, because extensive judicial review frustrates the basic purpose of arbitration, which is to dispose of disputes quickly and avoid the expense and delay of extended court proceedings. *Ibid.*

Zack's repeated reliance on this Court's decisions in the *United Steelworkers* series of cases is particularly bizarre, in light of the confirmation in those decisions of the lack of merit in Zack's arguments. Although those cases involved arbitration under collective bargaining agreements pursuant to the Labor Management Relations Act and thus involved national policy considerations not entirely applicable to commercial litigation, the views expressed by the majority are, we submit, as appropriate here:

> "A mere ambiguity in the opinion of the arbitrator accompanying an award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award.
>
> * * *
>
> It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *United Steelworkers* v. *Enterprise Wheel and Car Corp.,* 363 U.S. 593, 598-99 (1960)

The *United Steelworkers* cases, far from supporting Zack's position, only reaffirm the principle that "[w]hether the moving party is right or wrong is a question of contract interpretation for the arbitrator." *United Steelworkers* v. *American Mfg. Co.*, 363 U.S. 564, 568 (1960).

Nor does *Swift Industries, Inc.* v. *Botany Industries, Inc.*, 466 F.2d 1125 (3d Cir. 1972) support Zack's position here. That decision, citing the New York Court of Appeals, stated as the applicable rule of law that "an award of an arbitrator is not subject to judicial revision unless it is 'completely irrational.' " 466 F.2d at 1131. This is indeed the rule in New York. *Lentine* v. *Fundaro*, 29 N.Y. 2d 382, 385-86 (1972); *Matter of National Cash Register Co.* (*Wilson*), 8 N.Y. 2d 377, 383 (1960).

Zack has failed to make such a showing of "complete irrationality" in the case at bar. At most, its quarrel with the award is only on matters of disputed facts, credibility and contract interpretation.

II

The arbitrator's award could rationally have been based on the contracts submitted to him.

Zack suggests that the arbitrator "exceeded his authority" by awarding Intsel recovery on contracts 50240 and 50617, as amended, contending (1) that contract 50240 had allegedly been "superseded" on or about June 23, 1969 and (2) that Zack had presented testimony at the hearing that the written contracts had been orally "rescinded" and replaced by a new agreement. That the legal and factual

issues raised by these assertions were clearly within the scope of the arbitrator's power to determine can be seen by referring to the arbitration agreement between the parties, originally contained in the contracts of January 13, 1969 (A. 7a) and August 7, 1969 (A. 8a) and which was repeated on all subsequent "change order" forms reflecting modifications of the contracts:

> "Any controversy *arising under or in relation to this contract or any modification thereof* shall be settled by arbitration * * * in accordance with the Arbitration Laws of the State of New York and the Rules then obtaining of the American Arbitration Association * * *" (Emphasis supplied)

Under New York Law, it is clear that arbitration may be had as to all issues arising subsequent to the making of the contract, including the termination thereof, and that the issue of termination is for the arbitrators to decide. *Matter of Terminal Auxiliar Maritima S.A. (Winkler Credit Corporation)*, 6 N.Y. 2d 294, 298 (1959); *Matter of Lipman (Haeuser Shellac Co.)*, 289 N.Y. 76, 80 (1942). See also *Eastern Marine Corp.* v. *Fukaya Trading Co.*, 364 F. 2d 80, 85 (5th Cir. 1966). The factual and legal contentions asserted herein by Zack were presented at great length to the arbitrator (A. 29, 40, 45, 47) and after due consideration he made his award based on the written contracts as amended and the quantity of goods actually delivered, an award obviously within his power.

Zack repeatedly, and incorrectly, argues that its evidence at the hearing of an oral cancellation of the contracts was "undisputed" or "conceded". On the contrary, Intsel vigorously opposed those allegations and the docu-

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mentary evidence submitted on both sides tended to refute them (A.68). Of course, those issues of fact were for the arbitrator and from his decision, we can assume he determined them adversely to Zack. Introduction of all this evidence and repetition of the oral testimony by affidavit in the District Court was improper and meaningless. The trier of fact in this case was the arbitrator and the correctness of his factual decision was not before the Court.

If we understand Zack correctly, it is arguing that the arbitrator "disregarded the law" and "exceeded his authority" because in his award he referred to Instel's original contracts dated January 13, 1969 (#50240) (A.7-7a) and Aungust 7, 1969 (#50617) (A.8-8a). These contracts were subsequently amended and a complete list of the documents comprising the two contracts, as amended, appears in the record (A.64-67). At the hearing, Zack argued that as to #50240, only the amendment of June, 1969 (A.50, 51) was the contract, having replaced the original contract of January 13, 1969 (A.7-7a). This was vigorously disputed before the arbitrator and is contradicted by the very language of the June purchase order and "Change Order", which by their terms simply modify the January Agreement.

The most peculiar aspect of Zack's argument as to what the true contracts were is that even if its position in this regard were to be accepted, Intsel's claim would nevertheless be precisely the same and the amount of the award would also be the same. There is no disagreement that whether amended or replaced, the eventual contract #50240 was for 55,000 pounds of hollow bar (A.51) at

$.503 per pound (A.7) and the eventual contract #50617 was for 10,000 pounds of round rods at $.464 per pound (A.8). Since Intsel's confirmations with respect to both contracts contain the arbitration clause and neither side has ever questioned their authenticity, it is difficult to imagine what difference it could make whether the June documents were amendments of an earlier contract or new contracts. Since the matters submitted were contracts 50240 and 50617 in their entirety (A.70), this distinction without a difference could not affect the merits of the decision. In any event, as Judge Gurfein noted (A.113), the arbitrator did not purport to make his award only on the original contracts, but simply referred to them as the earliest documents containing the arbitration agreement (A.9).

Any suggestion that the damages in the award were computed incorrectly is self-contradictory and insupportable. Zack itself concedes that contract 50240, as amended or "superseded", was for 55,000 pounds and contract 50617 was for 10,000 pounds. At the hearing, evidence was presented to indicate that the pounds shipped slightly exceeded the pounds ordered, that Zack had approved these overages and that the invoice prices were based on the number of pounds actually shipped, accepted and retained by Zack (A.68). The amount of $35,253.60 is derived by simply multiplying the number of pounds actually shipped times the price per pound specified in the contracts (A.68-69). There was no miscalculation or other mistake in the award. Cf. 9 U.S.C. §11(a).

As noted above, the documents Zack says constituted the contract contained the same arbitration clause as the

earlier forms. Thus, its argument that there was "no arbitrable dispute" is totally unsupported. However, the time to make such an objection was when arbitration was demanded. The "threshold" issue of whether the contracts presented an arbitrable dispute cannot be decided after the parties have completed the entire arbitration process without objection.

III

Zack has shown no grounds for, nor does due process require, a trial *de novo*.

Zack contends that where an issue of fact has been raised as to whether the arbitrator exceeded his authority, the due process requirements of the Fifth Amendment to the United States Constitution mandate a full trial *de novo* of the facts that were submitted to the arbitrator. This argument not only misconstrues the nature of due process of law, but also completely ignores the essential nature and purpose of arbitration.

> "The Fifth Amendment guarantees no particular form of procedure, N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333, 351, 58 S.Ct. 904, 82 L.Ed. 1381, and in general there is no warrant in assuming a failure to grant a fair hearing by the lack of a trial in the strict or formal sense. The 'inquiry [should be] so fitted in its range to the needs of the occasion.' Escoe v. Zerbst, 295 U.S. 490, 55 S.Ct. 818, 820, 79 L.Ed. 1566" *Louisville Gas & Electric Co.* v. *Federal Power Commission,* 129 F.2d 126, 134 (6th Cir. 1942).

Due process only requires that a party have the opportunity to present his case. By "substituting arbitration as

the mode of trial" (*Murray Oil Products Co.* v. *Mitsui & Co.*, 146 F.2d 381, 384 (2d Cir. 1944)), the Arbitration Act does not deprive the parties of their right to be heard but merely permits the parties to agree voluntarily to a different form of hearing in order to expedite the resolution of the issues between them. Zack's petition herein errs in treating the District Court in this case as if it were the trier of fact. It is not. The trier of the facts at issue between the parties herein was the arbitrator and a trial in the District Court of the same issues that were presented at the arbitration hearing is unwarranted.

Zack voluntarily agreed to arbitration under the rules of the AAA. If it objected to the arbitration of Intsel's claim under the contracts, either because they had been terminated or because they were otherwise non-arbitrable, the time to raise that threshold issue was prior to the arbitration hearing. Having participated in the hearing and having presented all its arguments of fact and interpretation to the arbitrator, Zack cannot now say that the arbitration should never have been held. It had the opportunity to move for a stay of the arbitration on the ground that there was no arbitrable issue, but it waived that opportunity.

Zack argues that where issues of fact have been raised as to whether the arbitrator exceeded his authority, a full trial *de novo* should be held. But, of course, a review of the record herein discloses that no such issue of fact has been raised. This is not a case like *Hyman* v. *Pottberg's Executors*, 101 F.2d 262 (2 Cir. 1939), in which the arbitrators were also representatives of competing claimants to a common fund, thus suggesting on its face the possibility

of partiality, and where a trial was ordered as to that issue only. Nor is it similar to *Campbell* v. *American Fabrics Co.*, 168 F.2d 959 (2d Cir. 1948), where the evidence in the record, including the arbitrator's own sworn statement, indicated that he had substantially deviated from the narrow standards imposed upon him by the arbitration agreement. In the case at bar, there has been no showing of partiality or bias and the award of the arbitrator is within the bounds of the broad arbitration agreement. His decision was clearly within the bounds of rationality depending upon the factual issues presented at the hearing, the credibility of the witnesses and the arbitrator's reading of the contracts.

Conclusion

Zack's petition for a writ of summary reversal or of certiorari should be denied.

Dated: August 29, 1975

Respectfully submitted,

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